Filed 5/30/07 Elbaz v. Beverly Hills Unif. School Dist. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JONATHAN ELBAZ, a Minor, etc., et al. Plaintiffs and Appellants, v. BEVERLY HILLS UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B195563 (Los Angeles County Super. Ct. No. SC088669)

APPEAL from an order of the Superior Court of Los Angeles County. Valerie L. Baker, Judge. Affirmed.

Zimmerman & Kahanowitch, Brian F. Zimmerman and Megan C. Roth for Plaintiffs and Appellants.

Gibeaut, Mahan & Briscoe and Lisa J. Brown for Defendant and Respondent.

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Appellant Jonathan Elbaz (Elbaz), by and through Betty Elbaz, as guardian ad litem, appeals from a trial court order sustaining the demurrer of respondent Beverly Hills Unified School District (BHUSD) to Elbaz's first amended complaint. We conclude that two of Elbaz's claims against BHUSD are barred pursuant to Education Code section 35330,[1] and his third claim cannot proceed pursuant to section 32050.

Accordingly, we affirm.

FACTUAL[2] AND PROCEDURAL BACKGROUND

Elbaz is a pupil enrolled in Beverly Hills High School (the school). The school provides an extracurricular sports program to its student body, including a boys' soccer team. As of July 15, 2005, Elbaz was an active, participating member of the boys' soccer team. As a member of the team, Elbaz was required at various times to participate in soccer games and soccer tournaments at off-campus locations.

Prior to July 15, 2005, BHUSD circulated an announcement to the school's boys' soccer team regarding the Beverly Hills High School 2005 Boys' Summer Soccer Santa Barbara Tournament (the tournament), scheduled for July 15 through 17, 2005, in Santa Barbara. BHUSD made all travel arrangements for the team members attending the tournament, including by providing transportation, reserving hotel rooms, making sleeping arrangements, and arranging meals. BHUSD also charged a fee to all members of the soccer team participating in the tournament.

Elbaz attended the tournament.

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1 All further statutory references are to the Education Code unless otherwise indicated.

2 "Because this matter comes to us on demurrer, we take the facts from plaintiff's complaint, the allegations of which are deemed true for the limited purpose of determining whether plaintiff has stated a viable cause of action. [Citation.]" (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885.)

On July 15, 2005, while he was in his hotel room in Santa Barbara, Elbaz was severely beaten by several other members of the soccer team.

On February 17, 2006, Elbaz initiated this lawsuit against BHUSD. BHUSD demurred, and the trial court sustained the demurrer with leave to amend.

In July 2006, Elbaz filed and served his first amended complaint. In it, he alleges three causes of action for negligence: two based upon violation of section 44808, and one based upon section 32050.[3]

BHUSD demurred. It argued that it was immune from liability pursuant to section 35330. It also asserted that section 32050 does not provide for a private right of action.

Elbaz opposed the demurrer.

After hearing oral argument and taking the matter under submission, the trial court sustained BHUSD's demurrer to Elbaz's first amended complaint without leave to amend. It found that the "specific allegations in the First Amended Complaint established that the activity was a field trip or excursion under Section 35330," and that the immunity afforded by that statute applied. With respect to the third cause of action, the trial court sustained the demurrer on the grounds that there was no statutory liability.

An order of dismissal was entered, and Elbaz's timely appeal followed.

CONTENTIONS

With respect to the first two causes of action set forth in his first amended complaint, Elbaz contends that the tournament constitutes a "school-sponsored activity," bringing it within the purview of section 44808,[4] which would allow Elbaz to proceed on

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[3] Section 32050 was repealed effective January 1, 2007, and replaced with Penal Code section 245.6. (Stats. 2006, ch. 601, § 1.)

[4] Section 44808 provides, in relevant part: "Notwithstanding any other provision of this code, no school district . . . shall be responsible or in any way liable for the conduct or safety of any pupil of the public schools at any time when such pupil is not on school property, unless such district . . . has undertaken to provide transportation for such pupil to and from the school premises, has undertaken a school-sponsored activity off the premises of such school, has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances. [¶] In the

his negligence claims against BHUSD. BHUSD contends that it is immune from liability pursuant to section 35330[5] on the grounds that the tournament constitutes a "field trip" or an "excursion."

With respect to the third cause of action pled in the first amended complaint, Elbaz contends that he has stated a claim against BHUSD pursuant to section 32050, which prohibits hazing. Because section 32050 was repealed, Elbaz claims that he can pursue a nearly identical cause of action pursuant to Penal Code section 245.6.

DISCUSSION

I. *Standard of review*

"Our Supreme Court has set forth the standard of review for ruling on a demurrer dismissal as follows: 'On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows

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event of such a specific undertaking, the district . . . shall be liable or responsible for the conduct or safety of any pupil only while such pupil is or should be under the immediate and direct supervision of an employee of such district." (§ 44808.)

5 Section 35330 provides, in relevant part: "The governing board of any school district . . . may: [¶] (a) Conduct field trips or excursions in connection with courses of inspected or school-related social, educational, cultural, athletic, or school band activities to and from places in the state, any other state, the District of Columbia or a foreign country for pupils enrolled in elementary or secondary schools. [¶] . . . [¶] (d) . . . [¶] . . . [¶] All persons making the field trip or excursion shall be deemed to have waived all claims against the district or the State of California for injury, accident, illness, or death occurring during or by reason of the field trip or excursion." (§ 35330, subds. (a), (d).)

there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]' [Citations.]" (*Payne v. National Collection Systems, Inc.* (2001) 91 Cal.App.4th 1037, 1043–1044.)

II. *The trial court properly sustained BHUSD's demurrer to the first and second causes of action pursuant to section 35330*

"Except as otherwise provided by statute[, . . . a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code, § 815, subd. (a).)

"In the context of public schools, the Legislature has established different liability rules for injuries occurring during required school-sponsored, off-premises activities, on the one hand ([§ 44808]), and field trips or excursions, on the other hand ([§ 35330])." (*Myricks v. Lynwood Unified School Dist.* (1999) 74 Cal.App.4th 231, 238, fns. omitted (*Myricks*).) "If a student is injured while off campus for a school-sponsored activity, which is defined as an activity 'that requires attendance and for which attendance credit may be given' [citation], the student's injury is treated, for liability purposes, in the same manner as an on-campus injury. 'Students who are off of the school's property for *required* school purposes are entitled to the same safeguards as those who are on school property, within supervisorial limits.' [Citation.]" (*Id*. at p. 239; see also *Wolfe v. Dublin Unified School Dist.* (1997) 56 Cal.App.4th 126, 132; *Castro v. Los Angeles Bd. of Education* (1976) 54 Cal.App.3d 232, 236.)

"However, if a student is injured while on a 'field trip[] or excursion[] in connection with courses of instruction or school-related social, educational, cultural, athletic, or school band activities' [citation], he '*shall be deemed to have waived all claims against the district or the State of California for injury, accident, illness, or death occurring during or by reason of the filed trip or excursion*.'" (*Myricks*, *supra*, 74 Cal.App.4th at p. 239, quoting § 35330, subd. (d), italics added.)

After reviewing Elbaz's first amended complaint, we conclude that his claims against BHUSD have been waived pursuant to section 35330, subdivision (d). As a matter of law, the tournament constituted a field trip or an excursion, not a school-

sponsored activity. There are no allegations to indicate that Elbaz was required to attend,[6] or received credit for, taking part in the tournament. He does not allege that he received a grade for attending the tournament. The tournament occurred when school was not even in session.

Elbaz asserts that the tournament cannot constitute a field trip because it is participatory in nature, not observatory. In light of the legal authorities discussed above, we decline to construe the phrase "field trip" so narrowly.

Likewise, we reject Elbaz's claim that the tournament cannot constitute an excursion because it was not for recreational purposes or for pleasure; it was for competition. Nothing in the statutes or in the case law indicates that a sports competition cannot, as a matter of law, constitute an excursion.

Elbaz alleges in his first amended complaint that the tournament was a "school-sponsored activity," and not a field trip or an excursion. These allegations do not save his pleading from demurrer. While we must accept the truth of all facts pled, it is well-established that we do not assume the truth of contentions, deductions, or conclusions of law in the operative complaint. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967.) Thus, Elbaz's attempt to avert dismissal by alleging the conclusion that the tournament constituted a school-sponsored activity fails.

Elbaz also argues that it is premature to resolve this question now. Rather, if anything, this issue should be decided at the summary judgment stage of the litigation. We disagree. Elbaz has directed us to no evidence that will be adduced that will affect the outcome of this legal issue. And, there is no reason to delay resolution of this question of law.

Finally, we note that Elbaz's reliance upon *Acosta v. Los Angeles Unified School Dist.* (1995) 31 Cal.App.4th 471 is misplaced. The Court of Appeal in that case

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6 While Elbaz does allege that members of the soccer team were sometimes required to participate in off-campus games, he does not allege that participation in this tournament was mandated.

considered immunity under Government Code section 831.7, not immunity under section 35330. (*Acosta v. Los Angeles Unified School Dist.*, *supra*, at p. 476.)

III. *The trial court properly sustained BHUSD's demurrer to the third cause of action*

In the third cause of action, Elbaz purports to state a claim against BHUSD pursuant to section 32050. His efforts fail.

Section 32050 provides, in relevant part: "As used in this article, 'hazing' includes any method of initiation or preinitiation into a student organization or any pastime or amusement engaged in with respect to such organization which causes, or is likely to cause, bodily danger, physical harm, or personal degradation or disgrace resulting in physical or mental harm, to any student or other person attending any school . . . , but the term 'hazing' does not include customary athletic events or other similar contests or competitions."

The statute merely defines "hazing." It does not provide for a private right of action for such conduct. As such, Elbaz cannot state a claim for violation of this statute.

As noted in the appellate briefs, section 32050 was repealed effective January 1, 2007, and replaced by Penal Code section 245.6. Even if that statute were to apply, our conclusion would be the same. Penal Code section 245.6, subdivision (b) defines "hazing" as "any method of initiation or preinitiation into a student organization or student body." Subdivision (e) continues: "The person against whom the hazing is directed may commence a civil action for injury or damages . . . against . . . any organization to which the student is seeking membership." (Pen. Code, § 245.6, subd. (e).) Here, there are no allegations that Elbaz was seeking membership to the soccer team; he already was a member. It follows that Elbaz cannot state a claim under Penal Code section 245.6.

Elbaz asserts in his reply brief that the hazing statutes apply because "[i]nitiation between [the different] levels of teams clearly could and did take place." This belated argument will not save Elbaz's pleading from dismissal. It is well-established that we do not consider arguments first raised in a reply brief. (*Reichardt v. Hoffman* (1997) 52

Cal.App.4th 754, 764.) And, there is no evidence whatsoever to support this new claim. In neither his original complaint nor his first amended complaint did Elbaz assert that he was seeking initiation to a particular level of the boys' soccer team. He does not even so claim in his reply brief.

DISPOSITION

The order of the trial court is affirmed. BHUSD is entitled to costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD